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LOGORAMA: The Great Trademark Heist

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LOGORAMA: The Great Trademark Heist

By Rose Lawrence

In 2010 the Academy Award for Best Animated Short Film went to LOGORAMA, a 16-minute film by French collective H5. H5 used over 3,000 trademarked logos and mascots without permission as backgrounds, plots and characters. A Los Angeles is created from logos serving as buildings, street signs, vehicles and nature. The inhabitants include AOL messengers, Pringles men, and Michelin men. Ronald McDonald is the villain, who kills a foul-mouthed Haribo boy and takes the Big Boy burger boy hostage. The Esso Girl is the heroine who escapes the X-Box earthquake causing California to sink into the ocean until the new state outlines are a Nike Swoosh. LOGORAMA is a spectacular movie, but many question whether it is legal under the Lanham Act and the 2006 Trademark Dilution Revision Act. Since their trademarks were utilized without permission, all of the depicted trademark owners would seem to have claims for infringement and - given the crude and violent nature of the film - claims of dilution by tarnishment as well. However, recent legislative interpretation and judicial proceedings appear to indicate that LOGORAMA is a commercial use eligible for the non-commercial use exception under the Trademark Dilution Revision Act and protected free speech as parody under the First Amendment.¹

To constitute infringement, a mark must be used in commerce and likely to confuse consumers as to the product or service's origin.² Claims for infringement would be available to every mark in LOGORAMA that was in place of a tree, building, character, geography, vehicle, etc. For example, in *Caterpillar Inc., v. Walt Disney Co.*, Caterpillar sought to enjoin the release of Disney's "George of the Jungle 2" movie because the exact Caterpillar trademark was depicted on Caterpillar bulldozers used throughout the movie.³ The Central

District for Illinois court resisted applying a likelihood of confusion test to Caterpillar's claim, but nonetheless briefly went through the factors.⁴ The court did not recognize the presence of competing trademarks because the trademarks depicted were the authentic trademark and not confusingly similar trademarks.⁵

Likewise the court saw no competition between Caterpillar and "George of the Jungle 2" videos and DVD sales.⁶ The court did note Disney's bad intent in the unauthorized use of Caterpillar trademarks, but found it unconvincing as the Caterpillar trademark was not used to drive sales or derive consumer awareness of "George of the Jungle" videos and

DVDs.⁷

Additionally, the court did not see any evidence that in using the Caterpillar trademark Disney was attempting to "poach or free-ride on the fame and goodwill of Caterpillar's trademarks."⁸ In essence, Caterpillar's claims rested heavily on the mere presence of its trademarks in the movie, and the court responded by pointing to a long history of products "bearing well known trademarks" incorporated into movies and television.⁹ The court held that the mere presence was not enough for claims of infringement or dilution in "George of the Jungle 2."¹⁰ This judicial decision echoes others for the principle that permission is not needed for the use of brand names in fiction as long as the trademark refers specifically to the trademark owner and there is no confusion as to sponsorship or endorsement.

The same logic seems applicable to LOGORAMA. Most of the marks used in the film are merely present in the film and representative of nothing more than themselves. There is no presence

921 (C.D. Ill. 2003).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

1. This paper is restricted to the United States treatment of Trademarks, state and federal cases are referenced for support.

2. LANHAM ACT, 15 U.S.C. 22 (2006).

3. *Caterpillar Inc., v. Walt Disney Co.*, 287 F. Supp. 2d. 913, 919-

of competing marks - the marks used were specifically chosen because they were recognizable national brands that reference themselves and no other product.¹¹ Like in *Caterpillar*, it cannot be said that the LOGORAMA film competes with or substitutes the market for the logos depicted in the film, whose products range from oil, fast food, toothpaste, financial services, etc. It is unlikely that the public would think these trademark owners have branched into the film industry, much less as a collective. The sheer abundance of trademarks utilized also weighs against consumer confusion. It is hard to imagine that a reasonable person would watch LOGORAMA and believe that 3,000 trademark owners had functioned together to sponsor the film. Audiences are accustomed to seeing trademarks in movies, and do not tend to assume from their presence that the trademarks depicted represent an endorsement or other indication of origin. Rather, the marks are accepted as part of the visual vocabulary of the real world.

Similar to *Caterpillar*, there is a possible argument for H5's bad faith in using the 3,000 marks without permission. In *Caterpillar*, the court focused on whether the mark was used to drive sales of the film, and found that it was not.¹² LOGORAMA is unique in using nothing but logos, leading critics to question whether it would have garnered the same attention without the logos. The use of the logos certainly called the film to the public's initial attention; however, it was the expressive, and not commercial, use of these marks that was the heart of the film. LOGORAMA was first available, and remains, free online - its commercial success can be attributed to winning the 2010 Academy Award rather than the mere use of the marks.¹³ Even if a trademark owner were to argue that the expression of the marks contributed to LOGORAMA sales, the Northern District of California court in *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.* commented "expressive use of a mark is not rendered commercial by the impact of the use on sales."¹⁴

11. Nominative fair use is not discussed in this paper, as the main elements of the doctrine concern protection for using one brand to reference or distinguish another in a descriptive sense. Here there are no competing brands so nominative fair use is inapplicable, other than a stretched argument that LOGORAMA does not use the brands more than is necessary than to describe the world it creates.

12. *Caterpillar Inc., v. Walt Disney Co.*, 287 F. Supp. 2d. 913, 919-921 (C.D. Ill. 2003).

13. LOGORAMA can be viewed free of charge at UsefulArts.us, <http://usefularts.us/2010/04/24/watch-logorama-trademarks/>.

14. *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 900 (N.D. Cal. 2002).

If *Caterpillar* is controlling, then the additional claim of dilution by tarnishment against LOGORAMA is more compelling. Dilution does not require a likelihood of confusion.¹⁵ Dilution by tarnishment does require that a mark harm the reputation of a famous mark.¹⁶ This happens when the mark is cast in an unflattering light, typically through its association with inferior or unseemly products or services.¹⁷ The trademark's reputation and commercial value could be harmed "because the public will associate the lack of quality or the lack of prestige in the defendant's goods with the plaintiff's unrelated goods, or because the defendant's use reduces the trademark's reputation and standing in the eyes of consumers as a wholesome identifier of the owner's products or services."¹⁸ Finally, dilution by tarnishment is a claim only available to famous marks.¹⁹ Through the eight factors, the Trademark Dilution Revision Act effectively restricts "famous" to nationally recognized brands.²⁰ In LOGORAMA, the characters that dominate the plot are Ronald McDonald, the Esso Girl, Big Boy, Haribo, Michelin, Pringles, and, to a lesser extent, Green Giant and Mr. Clean. All these marks are representative of national brands and are therefore arguably "famous." In LOGORAMA it is these famous marks that make up the lead characters, responsible for the cursing, sex, and extreme violence that drive the plot. However, the remaining national brands used as buildings, geography, vehicles, and street signs may be eligible for consideration under the requirement of harm to reputation due to their inclusion in the film that features hyper language, sex, and violence. H5 specifically chose 3,000 famous national brands for use because they wanted them to be widely recognized by the public. However, on this claim LOGORAMA can be argued to be a protected free speech parody under the non-commercial exception of the Trademark Dilution Revision Act.

The key factor in finding a non-commercial use exception under dilution by tarnishment is that an offending mark must be tied to a product or service and

15. FEDERAL TRADEMARK DILUTION ACT, 15 U.S.C. 1125 (2006)

16. *Id.*

17. ToysRUs was successful in bringing a tarnishment claim against adultsrus.com, a pornographic web-site selling adult entertainment toys and video. *Toys "R" Us v. Akkaoui*, 40 U.S.P.Q.2d (BNA) 1836 (N.D. Cal. 1996).

18. *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39, 43 (2nd Cir. 1994).

19. FEDERAL TRADEMARK DILUTION ACT, 15 U.S.C 1125(c) (2006).

20. *Id.*

used in commerce.²¹ In *Mattel, Inc., v. MCA Records Inc.*, the “Barbie Girl” case, the Ninth Circuit court commented on the “noncommercial use” exception to the Anti-Dilution Act.²² Mattel brought suit for infringement and dilution by tarnishment against MCA Records for the single “Barbie Girl” by Aqua wherein Barbie was enticed to “go party.”²³ The court found the song to be a “commercial use in commerce,” because the song and the album used the mark and were sold to the public.²⁴ However, it also found “Barbie Girl” to be eligible for the non-commercial use exception, stating a “use in commerce” does not preclude a “non-commercial use” exception.²⁵ Deciding whether speech is commercial or non-commercial brings the First Amendment into the fight.

Previously in *Hoffman v. Capitol Cities/ABC Inc.*, the Ninth Circuit court delineated between commercial and noncommercial speech.²⁶ In *Hoffman*, a magazine printed unauthorized altered images of Dustin Hoffman and others. Hoffman sued for the unauthorized use of the Tootsie image. The court held that “the ‘core notion of commercial speech’ is that it ‘does no more than propose a commercial transaction.’”²⁷ The court found that if speech is not “purely commercial,” meaning it does more than a mere commercial transaction, than it is not infringing for trademark purposes but entitled to full protection under the First Amendment.²⁸ Specifically, it held that regardless of the commercial nature, the magazine ad was protected because of “humor” and “visual and verbal editorial comment.”²⁹ The fact that commercial elements were “inextricably entwined with [these] expressive elements,” lent it protection against trademark infringement and dilution.³⁰ *Mattel* also applied this standard and found “Barbie Girl” by Aqua to likewise not be purely commercial speech because it

expressed Aqua’s view of Barbie.³¹

LOGORAMA does not use any of the 3,000 marks in connection to a product or service other than those of the trademarks themselves. Rather, LOGORAMA utilizes the 3,000 marks to create a world of contemporary visual vocabulary. The marks are innovatively used for commentary on themselves as well as in relationship to each other. Similar to *Hoffman*, the commercial value of the LOGORAMA is inextricably entwined with expressive elements, and therefore the entirety should be protected under the First Amendment by its’ “visual and verbal editorial comment.”³² Thus, under *Mattel* and *Hoffman*, it would be difficult to cast LOGORAMA as “purely commercial” speech. LOGORAMA therefore should be eligible for the non-commercial speech exception to the Trademark Dilution Revision Act and protected under the First Amendment. Specifically, LOGORAMA should be protected as a parody.

In *Mattel*, the “Barbie Girl” song was found to be a parody that ridicules the image and cultural values Barbie supposedly represents.³³ *Mattel* points out further legislative history to support that parody - satire; editorial and other forms of expression were specifically not part of a commercial transaction in the purposing of the Trademark Dilution Revision Act.³⁴ *Mattel* referenced a previous ruling in *LL Bean, Inc. v. Drake Publishers, Inc.* affirming the parody protection.³⁵ LL Bean sought to enjoin the release of the magazine’s article “L.L. Bean’s Back-To-School-Sex-Catalogue,” which depicted a mark similar to L.L. Bean’s and showed nude models using products in sexually explicit positions.³⁶ The First Circuit court held this to be a parody, noting that if the anti-dilution statute allowed trademark owners to enjoin an unauthorized use of its’

21. “Dilution” refers to the “whittling away of the value of a trademark” when it’s used to identify different products. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 24.67, at 24-180; § 24.70 (2001).

22. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

23. *Id.* at 900.

24. *Id.* at 904.

25. *Id.* at 906., citing Jerome Gilson et al., *Trademark Protection and Practice* § 5.12[1][c][vi], at 5-240.

26. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

27. *Id.* at 1184 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)).

28. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001).

29. *Id.*

30. *Id.*

31. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

32. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001).

33. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

34. The proposed law “will not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction.” *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (quoting 141 Cong. Rec. S19306-10, S19310 (daily ed. Dec. 29, 1995) (statement of Sen. Hatch); 141 Cong. Rec. H14317-01, H14318 (daily ed. Dec. 12, 1995) (statement of Rep. Moorhead)).

35. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

36. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987).

trademark from being used in noncommercial contexts that were negative or offensive then “a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct.”³⁷ The First Circuit cited noncommercial settings to include editorial or artistic context communicating ideas or expressing points of view.³⁸ Furthermore, the court referenced a previous decision in which it held that neither the strictures of the First Amendment, nor the history and theory of anti-dilution law permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization.³⁹ LOGORAMA depicts the majority of its unauthorized famous marks in an unwholesome context, such as Ronald McDonald killing the Haribo Boy and taking Big Boy hostage, an up-the-skirt view of the Green Giant, and an extroverted homosexual Mr. Clean zoo guide. *L.L. Bean* and *Mattel* would indicate that though perhaps unwholesome and negative, these depictions alone are not actionable.

The crux of such protected expression is a parody that requires the target of the parody to be the mark itself and not the use of the mark to make a broader statement. In *Rogers v. Koons*, a copyright case, artist Jeff Koons made a sculpture from a photograph by Art Rogers.⁴⁰ The Second Circuit found Koons’ parody fair use defense unconvincing.⁴¹ The court held that the copyrighted work is required to be at least in part the target of the defendant’s satire to be legally considered a “parody.”⁴² However, the court also said that the “satire need not be only of the copied work and may . . . also be a parody of modern society” but it was critical the original work still be a target as well.⁴³ The purpose of this requirement was the court’s insistence that “the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.”⁴⁴ The court did not find parody or

sufficient satire, as the commentary of the banality of society Koons was after could have been achieved by other means and was not tied to the Rogers work for expression.⁴⁵

The copyright understanding of parody and satire is analogous in trademark law, as the court in *Mattel* relied on this in deciding that the “Barbie Girl” expression was protected as a parody.⁴⁶ While targeting Barbie specifically, the song had a broader message as well due to Barbie’s status as a cultural icon in society. In contrast, the Ninth Circuit court in *Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.*, did not find parody where the defendants used the writing style of Dr. Seuss and the trademark striped stovepipe hat on the front and back cover in a retelling of the O.J. Simpson trial.⁴⁷ Neither Dr. Seuss nor the trademarked Cat in the Hat were the targets of the parody, rather they were used to comment on the O.J. Simpson trial.⁴⁸ The court held that in situations where the artistic work targets an original work and does not use it merely to garner attention, the First Amendment has greater weight in the balancing test of trademark interests and protected speech.⁴⁹

LOGORAMA targets the marks themselves in creating an elaborate parody for artistic expression. Ronald McDonald, a wholesome mark representing McDonald’s, is primarily used to engage children in the consumption of McDonald’s fast food. In LOGORAMA, Ronald kills a child and threatens another before escaping on a Grease 2 motorcycle and crashing into a giant Weightwatchers truck. Similar to *Mattel* where Aqua targeted the cultural values associated with the Barbie Icon, LOGORAMA here targeted the cultural values associated with McDonald’s icon, Ronald McDonald. Both placed trademarked icons in hyper realities of sex or violence to parody their traditional values. During the X-Box earthquake, the corporate symbols initially shown as pillars in the society are seen crashing to the earth- including the Enron, K-Mart, and Freddie Mac corporations that have been involved in recent and very public scandals. Likewise, logos seen drowning in oil include Phillips 66, Chrysler, and the “W” from the George W. Bush reelection

37. Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view. *See L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987) (quoting *Lucasfilm Ltd. v. High Frontier*, 662 F. Supp. 931 (D.C. 1985)).

38. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 31-34 (1st Cir. 1987).

39. *Id.*

40. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

41. *Id.*

42. *Id.*

43. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) (citing *MCA, Inc. v. Wilson*, 677 F.2d at 185 (2d. Cir. 1981); 3 Nimmer, § 13.05[C] n. 60.9).

44. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

45. *Id.*

46. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

47. *Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

48. *Id.*

49. *Id.* at 1408.

campaign of 2004 - all logos connected strongly to oil production. While not all of the marks achieve the same level of parody, as already discussed in *Caterpillar*, mere presence is not actionable. Additionally, those logos that don't have as strong of a claim to parody are not used "merely to garner attention" which was the concern in *Dr. Seuss*. The use of every mark lends to the greater message of the film. One such instance occurs near the end of the film as an IBM building is seen collapsing. As it falls to the ground its slogan loses an "s" to read "Solutions for a mall planet." The larger parody is of a hyper consumption of the developed world and the overwhelming presence of brands in the public consciousness.⁵⁰ However, it is important to note that this broader parody is a natural result of parodying multiple brands at once and is not an independent critique that could have been made without the use of marks. Thus, LOGORAMA would seem to fit nicely into the *Koons*' court's consideration of copyright, in that a parody can be a parody of modern society as long as the original work is still targeted.⁵¹

This difference is important to note because the line between parody and satire is a hotly debated topic since *Campbell v. Acuff-Rose Music, Inc.*⁵² There, the Supreme Court differentiated between a parody that targets and mimics the original work to make its point and a satire that uses the work to criticize something else, therefore requiring justification for the very act of borrowing.⁵³ The Court specifically avoided creating a bright line rule regarding parody and satire in *Campbell*, pointing out the often hybrid nature of parody and satire.⁵⁴ *Campbell* merely states that the more attenuated the parody, the stronger the scrutiny and that "looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required."⁵⁵ Recent developments support the specific protection of unauthorized use trademarks in satire based on their intrinsic expressive value in society.

Judge Kozinski, who wrote the majority opinion in *Mattel*, noted in his 1993 speech "Trademarks Unplugged" that "when trademark owners put their mark to the public in well-orchestrated campaigns intended to burn them into our collective consciousness, the owners must then relinquish control over the trademark as a consequence of seeking such exposure because the mark has taken on symbolic meaning as part of society at large."⁵⁶ After a trademark has become part of the public discourse, the paramount concern in any balancing test must be the public's right to make use of the mark.⁵⁷ Further judicial proceedings have noted trademarks' unique expressive capacity as well.

In *Yankee Publishing, Inc., v. News American Publishing, Inc.*, the Southern District of New York court noted that many trademarks assume expressive value due to their prominence in culture.⁵⁸ "When unauthorized use of another's mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right."⁵⁹ In *Rogers v. Grimaldi*, the Second Circuit court held that "in general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."⁶⁰ Famous marks have particularly strong powers of expression, especially if they are cultural icons.⁶¹ Their fame has integrated the marks into daily life as well as public vocabulary; the use of the trademark is the most efficient way to reference it.⁶² The emerging arguments concerning trademarks' unique expressive power in the public consciousness would seem to strengthen the argument for satire. In a world populated by brands, it becomes necessary to include marks, whether the subject of parody or satire, for the expression to be successfully understood. The *Mattel* court seems to agree, stating, "Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions."⁶³ Thus, if LOGORAMA were

56. Alex Kozinski, Judge, United States *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 976 (1993).

57. *Id.*

58. *Yankee Publ'g, Inc., v. News Am. Publ'g, Inc.*, 809 F.Supp. 267, 282 (S.D.N.Y. 1992).

59. *Id.*

60. *Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989).

61. Steven Cordero, *Cocaine-Cola, The Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 599 (1998).

62. Robert Denicola, *Trademarks As Speech*, 1982 WIS.L.REV. 158 (1982).

63. *Mattel, Inc., v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002).

50. Esteban Del Rio, FLOWTV, *Logorama's Chaotic Critique of Corporate Rule*, Mar. 26 2010 available at <http://flowtv.org/?p=4857>. It is important to note this article uses parody and satire interchangeably, and does not use them in a legal sense.

51. "Though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody." *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

52. *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994).

53. *Id.* at 582.

54. *Id.*

55. *Id.*

to be considered satire rather than parody, it is possible it would still be protected. It is hard to talk about brands and consumption without using the brands that are nationally known. As a result of the film utilizing so many marks, LOGORAMA naturally assumes a secondary meaning beyond the marks.

Further support for a finding of non-commercial exception of parody in LOGORAMA is illustrated in *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, where Tommy Hilfiger sought to enjoin an animal perfume entitled Timmy Holedigger. The court for the Southern District of New York reasoned that the strength of the mark subject to parody might make it easier for an audience to recognize the use as a parody.⁶⁴ The marks used in LOGORAMA are nationally recognized brands whose reputation is well established, their depiction in the film is in total opposition to their established reputation. This extreme contrast should assist in a finding of parody. The concern in the copyright *Koons* case was that the audience must be aware that there is an original and separate expression attributable to a different artist.⁶⁵ In the hands of H5, the marks in LOGORAMA become something other and extremely different than what they were and it is understood these new marks are their creation, independent of the originals. Additionally, in deciding trademark dilution in *Caterpillar*, the court emphasized the “cartoon” nature of the film through its borrowing of motifs from animated films such as “belated recognition close-ups, collisions so bone-jarring that George’s outline is left embedded into a tree and other such well established cartoon clichés that clearly establish the fantastic nature of the movie.”⁶⁶ This fantastic nature lends to the idea that the public would not see the Caterpillar trademark used in the movie as an association that would harm the reputation of the trademark owner.⁶⁷ LOGORAMA is an animated film, involving similar motifs of the cartoon genre that, like *Caterpillar*, establish the fantastic nature of the film. Despite the extreme nature of the actions of many characters, the cartoon world should be sufficient for a court to find that the public would not see the associations in LOGORAMA to harm the marks depicted.

Judicial precedent seems to indicate that those

trademark owners who would bring claims of trademark infringement and dilution by tarnishment against LOGORAMA are unlikely to be successful. Factors that would normally be considered in a straight trademark infringement likelihood of confusion analysis are lacking. Most notably, there is an absence of competing goods, as the marks represent themselves in the film and the film cannot be considered in competition with them based on the reasoning in *Caterpillar*.⁶⁸ Also based on the sheer abundance of trademarks used, there is no likelihood of consumer confusion as to endorsement, sponsorship, or other indication of ownership. In terms of dilution, artistic expression has been found to be outside the scope of the anti-dilution statute’s protection of unauthorized use of trademarks in the marketing of “incompatible products or services.”⁶⁹ LOGORAMA is thus a daring example of the non-commercial use exception to the Trademark Dilution Revision Act and protected speech as parody under the First Amendment. It is unlikely, however, that the courts will have a chance to decide on this issue. Since winning the 2010 Academy Awards, LOGORAMA has garnered international attention and goodwill. It would be poor policy on behalf of the trademark owners to file suit. In fact, in the aftermath of the Oscars, it appears some trademark owners seem happy to have been recognized as “famous” enough to be included and have expressed no interest in pursuing trademark violation claims.⁷⁰ As a tongue-in-cheek response to the whole trademark question, H5 producer Nicolas Schmerkin in his acceptance speech thanked the 3,000 non-official sponsors that appear in the film and assured them that no logos were harmed in the making of LOGORAMA.⁷¹

68. *Caterpillar Inc., v. Walt Disney Co.*, 287 F. Supp. 2d. 913 (C.D. Ill. 2003).

69. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987).

70. Cash Converter, a depicted trademark, thanked H5 for including it in the film. Esteban Del Rio, *Logorama’s Chaotic Critique of Corporate Rule*, FLOWTV, Mar. 26 2010 available at <http://flowtv.org/?p=4857>.

71. *Id.*

64. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp 2d 410, 417 (S.D.N.Y. 2002).

65. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

66. *Caterpillar Inc., v. Walt Disney Co.*, 287 F. Supp. 2d. 913, 923 (C.D. Ill. 2003).

67. *Id.*